

No. 85-568

IN THE
Supreme Court of the United States

OCTOBER TERM, 1985

NANTAHALA POWER and LIGHT COMPANY; TAPOCO, INC.;
and ALUMINUM COMPANY OF AMERICA,
Appellants,

vs.

STATE OF NORTH CAROLINA ex rel. UTILITIES COMMISSION;
LACY H. THORNBURG, ATTORNEY GENERAL; et al.,
Appellees.

On Appeal from the Supreme Court of North Carolina

**BRIEF OF THE STATE OF TENNESSEE
AS AMICUS CURIAE IN SUPPORT OF THE
JURISDICTIONAL STATEMENT**

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QUESTIONS PRESENTED

1. Whether under the Commerce Clause a state, in setting retail electric rates within its borders, may give its citizens a preference to the inexpensive hydroelectric power generated and consumed in a multistate area?

2. Whether one state, in regulating retail electric rates within its borders, may set aside the interstate allocations of wholesale power and costs established by the Federal Energy Regulatory Commission, and impose a different allocation of costs which is more favorable to its own citizens?

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In accordance with this Court's Rule 36, the State of Tennessee, through its Attorney General, W.J. Michael Cody, and on behalf of its Department of Economic and Community Development, submits this brief as amicus curiae in support of the Jurisdictional Statement filed by Nantahala Power and Light Company; Tapoco, Inc.; and the Aluminum Company of America. Authority for the filing of the brief is found explicitly at Supreme Court Rules 36.1 and 36.4.

INTEREST OF THE STATE OF TENNESSEE

This case concerns the basic design of our federal system of government and the relationship of the states to each other and to federal authority. It involves the rights of the State of Tennessee and of its citizens within that framework. Tennessee has a vital interest in this case, both for jurisdictional reasons and because of its immediate impact on the economy of the State and the livelihoods of its citizens. The decision of the court below, if left undisturbed by this High Court, will have serious economic consequences in Tennessee. If the Alcoa facility in Tennessee is deprived of the inexpensive power that North Carolina has appropriated for itself, then the Tennessee facility may well be so uneconomical, in the power-intensive aluminum industry, as to require its closure. This would produce severe economic dislocations in Blount and surrounding counties in East Tennessee. It would cause the immediate loss of approximately four thousand jobs at the Alcoa facility alone, as well as additional thousands of related jobs in the area.

The decision of the North Carolina Utilities Commission, as upheld by the North Carolina Supreme Court, would divert from Tennessee to North Carolina the economic benefits of inexpensive hydroelectric power previously allotted to Tennessee by the Federal Energy Regulatory Commission (FERC). That this has been accomplished through the device of a local ratemaking proceeding in North Carolina makes its impact no less grievous. The reality of the situation is that North Carolina has overruled the decision of the FERC, which regulates the interstate flow of the power resources and associated costs in the region.¹ The North Carolina Commission has done this without

¹ The only exception to FERC regulation relates to the Tennessee Valley Authority (TVA), a major supplier of electric power in the region. As a federal government corporation, TVA, under the terms of its enabling statute, establishes its own rates. See 16 U.S.C. § 831 k.

considering the needs of Tennessee or its rights under FERC-approved rate schedules, determining instead that North Carolina customers are entitled to a "first call" preference on the inexpensive power resources of the mountain region.

Consequently, Tennessee is intensely interested in the outcome of this litigation, believing as it does that adherence to FERC's objective allocation of power and costs will prevent the economic devastation of mid-East Tennessee. Tennessee believes that review of this important case by this Court would establish the principle that one state cannot ignore and wholly supersede the allocation of power and costs among separate states determined by the FERC. Thus the outcome of this case will have a profound impact in Tennessee.

STATEMENT

Tennessee shares with North Carolina and other states the power resources of the southern Appalachian region, including a number of hydroelectric generation sites. A portion of the inexpensive hydroelectric power generated in North Carolina and Tennessee historically has been supplied by Tapoco, a Tennessee company, to one of Tennessee's large industrial power consumers, the Aluminum Company of America plant at Alcoa, Tennessee. Tapoco's use of this hydroelectric power to serve the Alcoa facility has been approved by the Federal Energy Regulatory Commission (FERC), the federal agency having exclusive jurisdiction over wholesale electric rates and the allocation of wholesale power among states.

In the instant case, however, the State of North Carolina, through its Utilities Commission, has for all practical purposes overruled the FERC and adopted a new method of distributing power costs in the southern mountain region. It has used as a convenient vehicle the fact that Nantahala Power and Light Company, the utility serving consumers in western Carolina,

and Tapoco, Inc., the utility serving the Alcoa plant in Tennessee, are both subsidiaries of Alcoa. While North Carolina's actions take the form of establishing retail rates in that state, the peculiar roll-in device used by the Utilities Commission produces a complete usurpation of FERC regulation. Moreover, when combined with the unjustified presumption that all the inexpensive power should first go to serve the North Carolina public load, the result effectively deprives Tennessee of the protection of FERC's impartial ratemakers.

The result is that Tennessee and one of its most important industrial facilities will be deprived of the benefits of the portion of the inexpensive hydropower allocated to them by FERC. This has been accomplished wholly through ratemaking proceedings in the agencies and tribunals of North Carolina, which are charged under North Carolina law with promoting the interests of North Carolina citizens. Whatever the institutional leanings of the North Carolina regulatory process, Tennessee has had no opportunity to participate in the decisions at issue. The North Carolina tribunals have acted without regard for FERC's findings, which were derived from proceedings that took into account all the interested parties and to which the North Carolina Attorney General and Nantahala's customers were parties. The FERC determinations were upheld by the United States Court of appeals for the Fourth Circuit. *Nantahala Power and Light Co. v. FERC*, 727 F.2d 1342 (4th Cir. 1984). Now the North Carolina authorities have superseded the federal findings and set Nantahala's rates in a manner that directly contradicts them, not only giving Nantahala's customers priority with respect to all the inexpensive hydropower in the region, but imposing a direct financial burden on a customer located in Tennessee. As a result the economy of East Tennessee is threatened with severe dislocations.

REASONS WHY THIS COURT SHOULD NOTE PROBABLE JURISDICTION

I.

The Decision Below Is Of National Importance And Merits Review By The Court.

The decision of the North Carolina tribunals is an affront to Tennessee's sovereignty and the comity that ought to exist between neighboring states. The regulation of interstate commerce in instances such as this was a paramount reason for the creation of the Federal Union and the Constitution. This Court ought to review such a blatant attempt by a state to gather unto itself scarce economic resources at the expense of its sister states.

This case is of great, immediate importance to the economy of the State of Tennessee. It is of even greater precedential importance to the electric power industry and to regulatory commissions in many states. Review by this Court will have repercussions in many state utility commissions that are being tempted to ignore FERC cost allocations and give their constituents preference in distributing scarce economic resources. Action by this Court is necessary to protect the effectiveness of the Federal Power Act and preserve the unified, national market in such resources envisioned by the framers of the Commerce Clause. These issues are of sufficient magnitude and nationwide concern to merit this High Court's review.

The transmission and sale of electric power in interstate commerce has long been of concern to the federal government. For this reason the Federal Power Act was framed to ensure that wholesale power transmission and sales would be fostered and not impeded by state regulation. The decision below by the Supreme Court of North Carolina is antithetical to these concerns and contravenes the letter and intent of both the Federal Power Act and the Commerce Clause.

The North Carolina Court has held that a state may examine interstate power allocations and set retail rates wholly without regard for the allocation of wholesale costs made by the FERC. It has rendered the FERC determination in the instant case meaningless. Should each state adopt a similar approach and give its own residents preference in electrical entitlements, the entire system of interstate wholesale power transmission would disintegrate into chaos and petty rivalries. The notion that a state utility commission may ignore FERC-approved wholesale costs in setting local retail power rates warrants prompt review by this Court.

II.

The North Carolina Decision Interferes With Commerce Between The States In Electricity.

The decision of the North Carolina tribunals is a parochial one. It seeks to restrict to that state the benefits of low-cost power generated in the mountains along with the North Carolina-Tennessee border. It denigrates any claim to a part of the hydropower that might be asserted by Tennessee or other states. In so doing, the decision comes into direct conflict with the Commerce Clause of the Constitution, which gives all Americans access to our scarce resources and prevents any state from sealing itself off from the national economy.

The North Carolina decision expressly is designed to further the best interests of the customers of Nantahala, all of whom are North Carolinians. It gives those customers first call on all the electric energy output of the combined systems of Nantahala and Tapoco. See *North Carolina ex rel. Utilities Commission v. Edmisten*, 299 N.C. 432, 434, 263 S.E.2d 583, 586 (1980); Appendix to Jurisdictional Statement at 183a. It ignores the countervailing interests and needs of Tennessee. It represents precisely the sort of burden on commerce that the Constitution

prohibits. See *Public Utilities Commission v. Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927); *Edgar v. MITE Corp.*, 457 U.S. 624 (1982).

The decision below does not physically prevent the flow of electric current, but its economic effect is exactly the same. It amounts to a burden on the transfer of power from North Carolina to Tennessee, since it reassigns the benefits of low-cost hydropower from Tapoco's customer in Tennessee to Nantahala's customers in North Carolina. The decision thus directly conflicts with *New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982). In that case New Hampshire did not prevent the flow of power across its border, but it set retail rates as if hydropower exported to other states had been consumed in New Hampshire. This Court struck down New Hampshire's efforts, holding its actions to constitute a burden on commerce. The instant case fits into the same category.

A similar approach has recently been adopted by the Eighth Circuit in *Middle South Energy, Inc. v. Arkansas Public Service Commission*, ___ F.2d ___ (8th Cir. August 23, 1985). In that matter the FERC had allocated power and associated costs among related utilities in four states. Those included the high cost of a nuclear power plant. Arkansas tried to reject those costs in setting retail rates, so its consumers would bear none of the nuclear plant costs. The Eighth Circuit held that Arkansas had contravened the Commerce Clause since it gave its citizens a preference over those of other states.

Here the North Carolina Commission has given the customers in that state preference with respect to all the cheap power, both that generated in North Carolina and that generated in Tennessee. Under its reasoning, as Nantahala's load grows, Tennessee in a few years will receive none of the hydroelectric power. North Carolina has thus instituted a blatantly protectionist policy that significantly impedes the flow of electric power in interstate commerce. By so doing it has infringed the

Commerce Clause. This Court should review the decision below to vindicate the interests of the national economy and in particular the rights of Tennessee to an unimpeded power supply.

III.

The Federal Power Act Mandates That North Carolina Accept Wholesale Costs Established By FERC In Setting Its Retail Rates.

The Federal Power Act contemplates that the FERC will regulate the sale and transmission of electricity among the several states and establish wholesale power costs. The states are then to include these costs in determining retail rates for the domestic utilities which they regulate. Under the "filed rate" doctrine, state commissioners must treat the rates fixed by the FERC as reasonable operating expenses for all purposes. See *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246 (1951). This does not prevent a state commission from finding that increases in FERC-approved rates are offset by savings in other facets of the utility's operations. It does mean, however, that the rates set by FERC are the foundation of any such calculations of retail rates. Nevertheless, the decision below has rejected the FERC's determinations about Nantahala's power costs and has reconsidered all aspects of its operations, reaching conclusions diametrically opposed to those of FERC when it considered the same matters. Such flouting of the rate schedules established by FERC cannot be tolerated under the Federal Power Act.

Under the approach adopted by the North Carolina Supreme Court, the Utilities Commission in that state may wholly disregard FERC's determinations and decide for itself that electricity arrangements between states are unreasonable. It may then refuse to permit local utilities to recover the costs they incur under FERC's wholesale rate schedules. While the decision

below does not propose to overturn the FERC's decision, its result is exactly that. The costs that consequently are not then covered by the North Carolina rates are shifted to consumers in other states.

The absurdity of the North Carolina view is best illustrated by supposing the Tennessee Public Service Commission might take the same approach and decide Tapoco's rates are too high and that Tennessee should have first call on all the inexpensive hydropower.² This would leave both Tapoco and Nantahala (as well as their parent Alcoa) in limbo, since neither could recover its cost of service, and both might be unable to serve their customers.

The role of FERC in power regulation at the wholesale level is inconsequential if its determinations do not carry through to influence retail rates. For this reason many courts have held that state commissions must provide for FERC-approved wholesale charges in establishing retail rates. See *Washington Gas Light Co. v. Public Service Commission*, 452 A.2d 375 (D.C. 1982), cert. denied, 462 U.S. 1107 (1983); *Narragansett Electric Co. v. Burke*, 119 R.I. 559, 381 A.2d 1358 (1977), cert. denied, 435 U.S. 972 (1978). This obviously means that the states may not reexamine FERC's wholesale cost allocations, but must accept them at face value and incorporate them in their decision-making. See *Northern States Power Co. v. Minnesota Public Service Commission*, 344 N.W.2d 374 (Minn.), cert. denied, ___ U.S. ___, 104 S.Ct. 3546 (1984); *Northern States Power Co. v. Hagen*, 314 N.W.2d 32 (N.D. 1981); *Office of Public Counsellor v. Indiana & Michigan Electric Co.*, 416 N.E.2d 161 (Ind.App. 1981).

² The history of the development of hydropower in the Southern mountains and the allocation thereof might well be viewed as giving Tapoco a far better claim to the cheap power than Nantahala or any North Carolina interests.

The approach used by the North Carolina Commission was to "roll-in" the power supplies and costs of Nantahala and Tapoco as if they were one system, and then to allocate to Nantahala the lion's share of low-cost power, leaving only a minimal amount for Tapoco. Under this approach, Tapoco in the near future will be allotted no hydroelectric power. This is directly contrary to FERC's determination that the agreements between the parties are fair to all concerned. This unilateral action of North Carolina has left Tennessee without any voice in the decision-making process and has nullified the authority of FERC in North Carolina. This Court ought to review the matter and hold that the Federal Power Act has preempted North Carolina from making such determinations.

CONCLUSION

The State of Tennessee submits that the Court should note probable jurisdiction and set the case for argument on its merits. Otherwise the Commerce Clause and the Federal Power Act will have been overridden by the parochial actions of one state. Tennessee believes that its right to participate in the decision-making process and its citizens' entitlement to a fair share of the region's hydroelectric power deserve the protection of this High Court.

Respectfully submitted,

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